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Office of Legislative Counsel

8 June 1978

Mr. Michael J. O'Neil, Chief Counsel
Permanent Select Committee on Intelligence
House of Representatives
Washington, D.C. 20515

Dear Mike:

We have been following the legislation now before the House Post Office and Civil Service Committee that would reform the Civil Service and provide protection for Federal employees who blow the whistle on illegal or improper activities. We are, of course, concerned with this legislation because of its potential impact on the personnel procedures and requirements of intelligence agencies. The Civil Service Commission has recommended a number of amendments to the legislation, including those that would exempt intelligence agencies from the provisions of the reform legislation; we support these amendments.

To provide you with a better sense of our concerns with the legislation, I am including two background papers we have prepared and a copy of the 17 May 1978 letter from Civil Service Commission Chairman Campbell to Chairman Ribicoff (an identical letter was sent to Chairman Nix), referring, among other things, to the need for exemptions for intelligence agencies.

Sincerely,



Acting Legislative Counsel

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Enclosures

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CIVIL SERVICE REFORM BILL AND THE NEED FOR CIA EXEMPTION

1. The unique mission and functions of the CIA are reflected in special organizational and personnel requirements. In recognition of this, the Agency has been exempted from many provisions of law regarding appointments, promotions, and separation from service. These exemptions are firmly based on the following factors:

--the need for CIA to protect the confidentiality of intelligence sources and methods;

--the need for flexibility in melding personnel resources to rapidly shifting requirements of foreign relations;

--the special hazards to which intelligence officers are subject in fulfilling their duties; and

--the unique pressures, such as susceptibility to "targeting" by foreign intelligence services, to which intelligence agencies and employees are subject.

2. The provisions of the Civil Service Reform legislation (H.R. 11280/S. 2640) would:

--conflict with the statutory responsibility of the Director of Central Intelligence to protect sources and methods from unauthorized disclosure (50 U.S.C. 403(d)(3) and 403g);

--conflict with the discretionary authority of the Director of Central Intelligence to remove employees of CIA in order to protect and further the nation's foreign intelligence efforts (50 U.S.C. 403(c)); and

--hamper CIA in its staffing flexibility and requirements and would conflict with the excepted status of its personnel system under 50 U.S.C. 403j.

3. The Central Intelligence Agency, therefore, in conformity with existing statutory exemptions and authorities should be exempt from the provisions of this bill.

WHISTLE-BLOWING LEGISLATION AND THE NEED FOR
SPECIAL CHANNELS FOR INTELLIGENCE AGENCIES

A. Objections to the Federal Employee Protection Act of 1978 (S. 3108),
and Recommendations

A particularly objectionable situation could result from the factors outlined in "B" below since the Director of Central Intelligence could be forced to retain an employee on a particularly sensitive national security project, thereby endangering the success of the mission itself, merely because, in the eyes of the proposed Special Counsel, the employee on his own raised a colorably legitimate complaint that the project was improper, illegal or merely "wasteful."

National security and intelligence matters generally, and possible intelligence agency improprieties in particular, are sufficiently different from other Government matters to warrant special treatment. This situation is reflected, for example, in S. Res. 400 and H. Res. 658, establishing, respectively, the Senate and House oversight committees. Legislation in this area should reflect that whistle-blowing procedures applicable to intelligence agencies and employees should be kept in separate channels, not merely that there be special procedures for handling the information while applying the same whistle-blowing procedures as for all other Government employees (the Humphrey-Leahy legislation does this). A 22 May 1978 letter from Civil Service Chairman Campbell to Chairman Ribicoff reflects the view that the Administration supports keeping intelligence employee whistle-blowing in separate channels (see Tab B; particularly page 3 thereof).

Although we support the position outlined in the preceding paragraph, we believe that the Agency should not, at this time, propose specific alternative whistle-blowing procedures for intelligence employees. This matter is an issue in the intelligence charter legislation (S. 2525/H.R. 11245); as yet, there is no consensus as to its resolution (e.g., whether the IOB mechanism should be codified in statute or left to Executive Order procedures). The charter legislation process, addressing as it will the wide variety of intelligence authorities, requirements and procedures, is the proper place to determine what whistle-blowing procedures should apply to intelligence employees. It is premature to discuss specific resolution of this matter in a vacuum at this time.

1. Merit System Protection Board (Merit Board)

--Five members appointed by the President, with advice of the Senate. Three may be members of the same political party; none may hold another office or position in the U.S. Government. Must have security clearances. Can only serve for one five-year term.

--Members and their designees have subpoena powers.

--Must submit annual report to the Congress of its activities, including a list of names of employees on whom penalties under this act have been imposed.

2. Special Counsel

--Must be an attorney; must have security clearances; appointed by the President, with advice and consent of the Senate. Serves for only one five-year term.

--Has all powers to carry out the provisions of the Act.

3. Disciplinary action may not be taken against an employee who discloses classified information concerning activities which the employee believes are illegal, provided he reveals such information to the Congress, the proposed Merit Board, the proposed office of Special Counsel, the U.S. Courts, any agency or any other employees. Only if the employee discloses classified information to "the public" could adverse action be taken.

--Upon receipt of the allegation, the Special Counsel must conduct an investigation within 15 days. If he decides not to proceed, this decision may be appealed to the Merit Board. The Special Counsel may also freeze any adverse personnel action taken against a complaining employee. Allegations which appear to have merit are referred to the appropriate agency head who must complete his investigation within 30 days; he does have a 15-day grace period. A representative of the Special Counsel will monitor the investigation and the Special Counsel is empowered to institute his own which would determine, apparently, whether the information on which the "whistle was blown" in fact concerned an illegal or improper activity.

--Only the portions of hearings or proceedings involving classified information will be closed to the public. All transcripts will be protected and unavailable to the public.

--Persons involved with the hearings who do not have security clearances, nonetheless, will have access to all information under the supervision and direction of the Special Counsel. They will be allowed to attend all the hearings and proceedings and take part in the investigation.

--The Special Counsel may appoint any person to look at classified information and attend all hearings, proceedings, or investigations.

--The Special Counsel has power to order corrective personnel actions, including reinstatement, removal, payments or damages.

--The Special Counsel may institute disciplinary proceedings against an employee who has taken, or attempted to take, an adverse personnel action against a complaining employee or who has engaged in, or attempted to engage in, an illegal or improper activity.

4. Appeals

--Any aggrieved employee or agency may appeal Special Counsel decisions to the Merit System Protection Board and then to the Courts.

5. Miscellaneous

--The Court will award attorney's fees and costs.

--The Court will also furnish employees with representation regardless of cost.

--U.S. Government may recover from any employee who committed a willful and knowing violation under this bill damages, fees and costs.

C. For comparison, the following are the salient provisions concerning whistle-blowing in the Civil Service Bill itself:

--Grants subpoena power to Special Counsel, proposed Merit Board and other designated personnel.

--The Special Counsel can freeze any personnel action having substantial economic impact on complaining employee until the investigation is over.

--The Special Counsel can require an agency head to take corrective action.

--If no corrective action is taken, the Special Counsel could institute disciplinary proceedings against an employee who failed to implement corrective action.

--The Special Counsel will maintain a public list of violations of law or regulation referred to an agency head, along with a certification of actions taken thereon.



UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D. C. 20415

Honorable Abraham Ribicoff
Chairman
Committee on Governmental Affairs
United States Senate
3308 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Ribicoff:

I am enclosing a copy of S. 2640 which has been revised to include changes which the Administration believes would improve the bill. We would be grateful if the committee would consider these changes during the course of marking up S. 2640.

A number of changes reflect a modification in the policy initially proposed by the Administration. These include:

1. Revised section 1104 adds a requirement that delegation of examining authority be subject to Office of Personnel Management standards and oversight.
2. Revised section 1206(c) (2) allows the Special Counsel to intervene in any appealable matter before the Merit Systems Protection Board for the purpose of presenting evidence of reprisals being taken against the appellant.
3. A new section 1206(m) requires the Special Counsel to report annually to the President and Congress concerning the investigation and disposition of all cases involving prohibited personnel practices, including those involving Presidential appointees.
4. Section 4303, relating to demotion or removal for unacceptable performance is revised to:
 - (a) require inclusion of charges of prior failures to perform if they are to be a part of the decision.

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- (b) require the agency to make a prima facie demonstration that the agency's determination was reasonable.
5. Section 7701 pertaining to the handling of personal cause appeals has been revised to:
- (a) permit any party to move for summary judgment and the adverse party to respond. Summary judgment; i.e., without a hearing, may be granted only if the appeals officer finds that there are no genuine or material issues of fact in dispute.
 - (b) place the initial burden on the agency to provide a prima facie demonstration that the disciplinary action promotes the efficiency of the service.
 - (c) require the employee to show that the agency's procedures substantially impaired the employee's rights, or that there was discrimination, or that the decision was arbitrary and capricious.
 - (d) limit OPM petitions for Board or Judicial review of a decision to those decisions which the Director feels are erroneous and will have a substantial impact on law, rule or regulation.

The new Title VII previously submitted to the committee provides for the establishment of arbitration procedures through bargaining. The arbitrator would be guided by the same standards described in paragraph 5(c) above.

6. Revised section 3132(a)(4) eliminates authority to fill career reserved positions through emergency or term appointments.
7. Section 3134, as revised, limits non-career appointees in each agency to 25% or the proportion in effect at the time of enactment, whichever is higher.

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8. Revised section 4311(b) requires the agency to consult with the Senior Executive in establishing performance requirements.
9. Revised section 5402(c)(2) provides that no employee will have pay reduced as a result of conversion to the merit pay system.
10. Revised section 5403 allows the merit pay system to be installed on a phased basis.

I want to particularly note that language has been changed at several points so as to be consistent with the provisions of Reorganization Plan I transferring Title VII of the Civil Rights Act and other responsibilities related to discrimination from the Civil Service Commission to the Equal Employment Opportunity Commission. The changes make clear that the meaning of discrimination shall be that developed under those Acts for which EEOC has responsibility. (Sections 2302(b)(1); 2302(d); 7701(g); 7701(h).

The bill is also amended at several points to exclude Government Corporations, the General Accounting Office and the intelligence agencies from coverage.

In addition to the major changes noted above, we have made many technical corrections.

We would be pleased to work with the committee to answer any questions on these matters.

Sincerely,

Alan K. Campbell

Enclosure

1 in controlled situations to achieve more efficient manage-
2 ment of the Government's human resources and greater
3 productivity in the delivery of service to the public;
4 and

5 (8) the training program of the Government should
6 include retraining of employees for positions in other
7 agencies to avoid separations during reductions in force
8 and the loss to the Government of the knowledge and
9 experience that these employees possess, and that this
10 policy will result in maintaining the morale and produc-
11 tivity of employees.

12 TITLE I—MERIT SYSTEM PRINCIPLES

13 MERIT SYSTEM PRINCIPLES; PROHIBITED PERSONNEL
14 PRACTICES

15 SEC. 101. (a) Title 5, United States Code, is amended
16 by inserting, after chapter 21, the following new chapter:

17 "Chapter 23.—MERIT SYSTEM PRINCIPLES

"Sec.

"2301. Merit system principles.

"2302. Prohibited personnel practices.

"2303. Responsibility of the General Accounting Office.

18 "§ 2301. Merit system principles

19 "(a) (1) Except as provided in paragraph (2) of this
20 subsection, this ^{chapter} ~~section~~ shall apply to—

21 "(A) an executive agency;

22 "(B) the Administrative Office of the United States
23 Courts; and

“(C) the Government Printing Office.

“(2) This ^{chapter} ~~section~~ shall not apply to—

“(A) a Government corporation;

“(B) the Central Intelligence Agency, the Defense Intelligence Agency, and the National Security Agency, and, as determined by the President, an executive agency or unit thereof which conducts foreign intelligence or counterintelligence activities;

“(C) the General Accounting Office; and

“(D) any agency, or any unit, position or position therein, excluded from the application of this section by the President.

“(b) It is the policy of the Congress that in order to provide the people of the United States with a competent, honest, and productive Federal work force reflective of the Nation's diversity, and to improve the quality of public service, Federal personnel management should be implemented consistent with merit system principles.

“(c) The merit system principles are as follows:

“(1) Recruitment should be from qualified candidates from appropriate sources in an endeavor to achieve a force from all segments of society, and selection and advancement should be determined solely on the basis of merit, ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity.

2 ~~General Accounting Office, but~~
3 ~~and does not~~

4 include any agency or unit thereof excluded from cov-
5 erage by the President under subsection (c) of this
6 section;

7 "(2) 'agency' does not include the Central

8 "(3) 'Senior Executive Service position' means a
9 position above the GS-15 or equivalent level in which
10 the incumbent—

11 "(A) directs the work of an organizational
12 unit;

13 "(B) is held accountable for the success of
14 specific line or staff programs or projects;

15 "(C) monitors the progress of the organization
16 toward goals and periodically evaluates and makes
17 appropriate adjustments to such goals; or

18 "(D) supervises the work of employees other
19 than personal assistants;

20 "(4) 'executive' means a member of the Senior
21 Executive Service;

22 "(5) 'career reserved position' means a position
23 which can only be filled by a career appointee, ~~or under~~
24 ~~a limited emergency or term appointment~~ and to which
it is justifiable to restrict appointment to career employ-

Intelligence Agency, the Defense Intelligence Agency, the National Security Agency, and, as determined by the President, an executive agency or unit which conducts foreign intelligence or counterintelligence activities.

23 “(3) No employee may be paid less than the minimum
24 rate of basic pay of the grade of such employee's position. [INSERT
25 “(d) (1) Under regulations prescribed by the Office of ^ #10]

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2 thereof) ;

3 " (2) 'agency' does not include the Central Intelligence

4 " (Z) 'employee' means an individual employed in

5 or under an agency;

6 " (3) 'eligible' means an individual who has quali-
7 fied for appointment in an agency and whose name has
8 been entered on the appropriate register or list of eli-
9 gibles;

10 " (4) 'demonstration project' means a project con-
11 ducted by the Office of Personnel Management, or un-
12 der its supervision, to determine whether a specified
13 change in personnel management policies or procedures
14 would result in improved Federal personnel manage-
15 ment; and

16 " (5) 'research program' means a planned study of
17 the manner in which public management policies and
18 systems are operating, the effects of those policies and
19 systems, the possibilities for change, and comparisons
20 among policies and systems.

21 "§ 4702. Research and development functions

22 "The Office of Personnel Management shall—

23 " (1) establish and maintain (and assist in the es-
24 tablishment and maintenance of) research and develop-
25 ment projects of improved methods and technologies in
Federal personnel management:

Agency, the Defense Intelligence Agency and
the National Security Agency and, as determined
by the President, an executive agency or unit
thereof which conducts foreign intelligence or
counterintelligence activities.